

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters for
FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1988;

Released: April 29, 1988

By the Commission:

INTRODUCTION

1. The Commission has before it two petitions for reconsideration of the *Second Report and Order (Second Report)*¹ in this proceeding. One petition, filed by Brown Broadcasting Service, Inc. on November 5, 1987, requests that the Commission reconsider and modify its action that amended Section 73.213 of the rules, which governs relocations and modifications of grandfathered short-spaced FM stations. The other petition, filed by Eric R. Hilding on November 6, 1987, requests that the Commission reconsider and modify its action that amended Section 73.211 of the rules, which sets forth power and antenna height requirements for each of the six classes of FM stations. No comments were filed in response to either petition.

BACKGROUND

2. We initiated this proceeding with a *Notice of Proposed Rule Making (Notice)*² that proposed minor adjustments to certain rules that were affected by our actions in BC Docket No. 80-90³, but were not given detailed consideration in that proceeding. In the *Notice*, we also proposed a new method for classifying FM stations and revision of certain technical rules that needed updating.

3. More than 400 parties filed comments or reply comments in response to the *Notice*. In January 1987, we adopted a *First Report and Order*⁴ resolving two of the issues in the *Notice*. Subsequently, in September 1987, we adopted the *Second Report* addressing the remaining issues. In the *Second Report*, we set forth a definitive method for classifying FM stations according to their effective radiated power (ERP) and antenna height above average terrain (HAAT). Also, we amended our rules to limit relocations and modifications of grandfathered short-spaced FM stations, allowing only those that would not increase the potential for interference.

ISSUES

4. *The Brown Petition.* Brown Broadcasting Service, Inc. (Brown) is the licensee of station WBRU, Channel 238B, Providence, Rhode Island. WBRU is a commercial station staffed primarily by students at Brown University. WBRU is also a grandfathered short-spaced station,⁵ and thus is subject to Section 73.213 of the Commission's rules, which governs modifications and relocations for these stations. Brown claims that WBRU would be adversely affected by the Commission's revision of that section of the rules.

5. Brown states that it is in the middle of an extended process to obtain a new tower site. At the new site, Brown believes that WBRU would be able to operate with 50,000 watts effective radiated power. Brown fears that newly amended Section 73.213 will prevent WBRU from moving to this new site because, in effect, the amended rule limits each grandfathered short-spaced station to the predicted coverage (in the direction of other grandfathered short-spaced stations) which that station actually had on the effective date⁶ of the *Second Report*.⁷ On this date, WBRU was operating with a lower power (20,000 watts) at what it considers to be a temporary site.⁸ Brown does not want WBRU's coverage to be limited in the future to that provided by the lower power at the temporary site. As a remedy, Brown requests that the Commission's action that amended Section 73.213 be modified to permit any grandfathered short-spaced station to be authorized for facilities that would produce predicted coverage equivalent to either: (1) the maximum predicted coverage that could have been authorized under the old rule; or alternatively, (2) the maximum predicted coverage from a site that is not short-spaced.

6. *Discussion.* Prior to the *Second Report*, Section 73.213 allowed licensees to routinely modify or relocate grandfathered short-spaced stations, even if the potential for interference were increased as a result. In the *Second Report* we affirmed our contention that licensees of grandfathered short-spaced stations have had sufficient time (22 years) to relocate and optimize their facilities under the relatively liberal provisions of the old rule. We found that continuing to allow relocations and modifications that increase the risk of interference is not in the public interest and is counter to our objective of promoting efficiency in the use of the spectrum. We therefore amended the rule to allow only relocations and modifications that will not increase predicted interference. We also reaffirmed and expanded our policy of accepting for consideration agreements between grandfathered short-spaced stations that would permit increases in both facilities.⁹

7. Brown did not present any evidence to demonstrate that any grandfathered short-spaced station other than WBRU has or anticipates a similar problem; that is, operation at an interim location on the effective date of our action. No comments were filed by other grandfathered short-spaced stations in support of Brown's petition. We are not aware of any grandfathered short-spaced station other than WBRU that would be significantly affected by our action in the *Second Report*. Therefore, we must conclude that Brown's situation, if not unique, is rather uncommon.

8. Tailoring Section 73.213, which affects all grandfathered short-spaced stations, to fit circumstances peculiar to one particular grandfathered short-spaced station would not be good public policy.¹⁰ Because Brown's situation with regard to the site for WBRU appears to be an individual problem, any relief that may be necessary

would be more appropriately considered in the context of a request for a waiver of Section 73.213, rather than through any further amendment of that rule.¹¹

9. Even if additional grandfathered short-spaced stations were affected in a manner similar to WBRU, we would not amend Section 73.213 of our rules in either of the ways that Brown suggests. The first alternative¹² that Brown offers would, in effect, reinstate the old rule and undermine our purpose in changing the rule in the *Second Report*, namely, to prevent further increases in interference resulting from modifications and relocations of grandfathered short-spaced stations. The other alternative suggested by Brown¹³, if made a rule, would be implemented by licensees largely through the use of directional antennas. As we are currently considering in a broader context the possibility of permitting short-spaced operation through the use of directional antennas,¹⁴ we will not entertain Brown's less comprehensive suggestion here. For all of the foregoing reasons we will deny Brown's petition.

10. *The Hilding Petition*. Eric R. Hilding (Hilding), in his petition, states that Section 73.211, as amended by the *Second Report*, excludes Class A FM stations from "the benefit of certain reference distance considerations", and claims that this exclusion prevents Class A FM stations from utilizing relatively high (and therefore desirable) antenna locations. To illustrate this, Hilding provides a hypothetical account of a Class A FM station with access to a site that would provide an antenna HAAT of 639.5 meters. He states that the hypothetical Class A station would need to operate with an ERP of 65 watts at this site in order to provide full Class A coverage, but that "such operation would *not* be permitted pursuant to Section 73.211(a)(3)."¹⁵ Hilding concludes that the hypothetical Class A station could not use the site.

11. For relief, Hilding requests that the Commission modify its action that amended Section 73.211 by adding another paragraph to that section. The additional paragraph Hilding provides would expressly permit any Class A station, regardless of its HAAT, to operate with less than 100 watts, provided that the resulting reference distance equals or exceeds that of a Class A station operating with minimum facilities.¹⁶ Hilding further requests that a reference to this additional paragraph be added to paragraph 73.211(b)(2).

12. *Discussion*. Section 73.211 does not preclude a Class A FM station from using any desired antenna site, regardless of the elevation or the resulting antenna HAAT.¹⁷ Therefore, the hypothetical station in Hilding's example would not be prevented by Section 73.211 from using the 639.5 meter HAAT antenna site.

13. Hilding does raise a good point, however. Section 73.211 as it now stands does treat Class A stations differently than stations of the other classes in this respect -- Class A stations at very high antenna sites must provide the full maximum Class A coverage,¹⁸ whereas Class B1, B, C2, C1 and C stations need only provide more coverage than the full maximum coverage of the *next lower class*.¹⁹ In the particular paragraph (§73.211(a)(3)) that states this, Class A stations were excluded because there is no lower class to establish a minimum coverage requirement for Class A stations.

14. We find that Hilding's suggestion to use Class A minimum facilities as the lower boundary for Class A coverage is reasonable and appropriate. Accordingly, we will amend Section 73.211 to permit any Class A station to have an ERP less than 100 watts, provided that the

reference distance equals or exceeds 6 kilometers. See footnote 16 *supra*. Rather than adding a new paragraph, we are appending the appropriate language to paragraph 73.211(a)(3). See Appendix.

OTHER MATTERS

15. The rule amendment contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and it will not increase or decrease burden hours imposed on the public.

16. Because the rule amendment we are adopting herein is a substantive rule which grants an exemption and relieves a restriction, we are designating that it shall become effective immediately upon publication in the Federal Register.²⁰ Applications pending or received on or after September 25, 1987 (the release date of the *Second Report*) may be processed in accordance with the newly amended rule.²¹

ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Brown Broadcasting Service, Inc. IS DENIED, and That the Petition for Reconsideration filed by Eric R. Hilding IS GRANTED.

18. IT IS FURTHER ORDERED That Part 73 of the Commission's Rules and Regulations IS AMENDED, as set forth in the Appendix below, effective upon publication in the Federal Register. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III.
Acting Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.211 is amended by revising paragraph (a)(3) to read as follows:

§ 73.211 Power and antenna height requirements.

(a) * * *

(3) Stations of any class except Class A may have an ERP less than that specified in paragraph (a)(1) of this section, provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section,

exceeds the distance to the class contour for the next lower class, Class A stations may have an ERP less than 100 watts provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, equals or exceeds 6 kilometers.

* * * * *

FOOTNOTES

¹ 2 FCC Rcd 5693 (1987), released September 25, 1987.

² 104 FCC 2d 160 (1986).

³ *Report and Order*, 94 FCC 2d 152 (1983); *recon. granted in part and denied in part*, 97 FCC 2d 279 (1984). The Commission amended the FM broadcasting rules to accommodate more stations by increasing the number of station classes.

⁴ 2 FCC Rcd 660 (1987). The Commission amended the rules to permit any class of station to be allotted on 20 channels that were previously reserved for Class A operation. Also, the Commission declined to remove a rule section that provides for the classification of stations by zone based on transmitter location rather than the location of the community of license.

⁵ Grandfathered short-spaced stations are FM stations at locations authorized prior to November 16, 1964 (when the Commission began using the distance-based allotment and assignment method) that did not meet the separation distances required by §73.207 and have remained short-spaced since that time. These stations are allowed to continue to operate at or near their 1964 locations even though these locations do not comply with current interstation distance separation requirements.

⁶ The effective date of the *Second Report* was November 9, 1987.

⁷ §73.213, as amended, permits modification or relocation of any grandfathered short-spaced station provided that the station's predicted 1 mV/m field strength contour is not extended toward the predicted 1 mV/m field strength contour of any other grandfathered short-spaced station.

⁸ WBRU has been operating at this site with an ERP of 20,000 watts for more than 10 years.

⁹ If the Commission finds that the public interest would be served by a mutual increase in the facilities of two or more grandfathered short-spaced stations pursuant to the terms of such an agreement, Section 73.213 may be waived to permit the increase. However, this policy does not apply to site relocations. See *Public Notice*, FCC 75-1367, dated December 15, 1975, 57 FCC 2d 1263 (1975); 40 Fed. Reg. 58893, December 19, 1975, codified in §73.4235 of the Commission's rules. See also *Public Notice*, released September 25, 1987, 2 FCC Rcd 5701 (1987), which extended the policy to encompass agreements with grandfathered short-spaced stations on the second and third adjacent channels.

¹⁰ Rules adopted in a generic rule making are of general applicability and do not consider the special circumstances of individual parties. The rule making process contemplates the subsequent consideration and possible grant of rule waivers for good cause shown in specific cases where unique or unusual circumstances obtain, or to remedy unintended hardships occasioned by our rules. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹¹ Brown has pending an application (BPH871106IU) that requests an increase in power to 50,000 watts and a site relocation. This application was filed three days before the effective date of the *Second Report*, and therefore can be processed in accordance with the old §73.213. If this application is granted, Brown will gain the relief it seeks in the instant petition. If the application is

not granted, Brown has the option of requesting, with the appropriate public interest showing, a waiver of the newly amended §73.213. The Commission does not here evaluate or rule on the merits of any future relocation of WBRU. Rather, the Commission's decision in this *Memorandum Opinion and Order* is based primarily on the inappropriateness of amending a rule affecting an entire group of licensees solely in response to the concerns of one licensee in that group.

¹² Under this alternative, grandfathered short-spaced FM stations could be modified or relocated in any way that would produce a predicted contour matching the predicted contour of a short-spaced facility that could have been authorized under the old rule.

¹³ The second alternative suggested by Brown is to permit any modification or relocation of a grandfathered short-spaced FM station that would produce a predicted contour that matches the predicted contour of hypothetical facility at a non-short-spaced site. This is essentially the concept of "equivalent protection".

¹⁴ See *Notice of Proposed Rule Making* in MM Docket 87-121 (FCC 88-73, released March 30, 1988). For additional background, see *Notice of Inquiry* in MM Docket 87-121, 2 FCC Rcd 3141 (1987). The Commission has requested comment as to the feasibility of the use of directional antennas to permit short-spaced operation by any FM broadcast station, not just the grandfathered ones affected by §73.213.

¹⁵ Hilding implies (although he does not explicitly state) that paragraph 73.211(a)(3), which was added to the rule in the *Second Report*, prevents Class A stations from reducing power below 100 watts pursuant to paragraph 73.211(b)(2), in effect limiting Class A stations to a maximum HAAT of 525 meters (1722 feet).

¹⁶ The minimum facilities for a Class A FM station are considered to be 100 watts ERP with an antenna HAAT of 30 meters. This combination produces a reference distance of 6 kilometers.

¹⁷ The rules permit operation of a Class A FM broadcast station with any antenna HAAT. However, with an antenna HAAT greater than the Class A reference HAAT (100 meters), the station's ERP must be lower than the 3,000 watt class maximum such that the resulting reference distance does not exceed 24 kilometers. For a HAAT of 639.5 meters, the example Hilding uses, §73.211(b)(2) does indeed limit a Class A station to 65 watts ERP, but such operation is not prohibited by §73.211(a)(3), as Hilding claims.

¹⁸ A reference distance of 24 kilometers constitutes full coverage for a Class A FM broadcast station. As of January 1988, there are 10 Class A stations that have an antenna HAAT greater than 525 meters. Eight of these are providing full coverage. See footnote 15 *supra*.

¹⁹ Before the *Second Report*, all FM stations at very high antenna sites were required to provide the full maximum coverage for their class. However, the Commission found it necessary to allow stations the option to provide less than full coverage in order to facilitate classification of FM stations and to provide a continuous range of permissible facilities. See paragraph 14 in the *Second Report*.

²⁰ See 5 U.S.C. 553(d).

²¹ The restriction removed herein was an unintended effect of the Commission's action in the *Second Report*. Applying the newly amended rule to the processing of applications pending or received on or after the release date of that decision will eliminate any hardship that may have resulted.